Supreme Court, U. S.
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IN THE

Supreme Court of the United States

..... TERM, 1979

No. 79-288

PAUL E. VANCE,
Petitioner,

vs.

EUGENE BARKSDALE, Sheriff of Shelby County, Tennessee, and the STATE OF TENNESSEE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals Sixth Circuit

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TO THE HONORABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Paul E. Vance, prays that a writ of certiorari be issued to the United States Court of Appeals for the Sixth Circuit to view its order of June 21, 1979, wherein the Sixth Circuit Court of Appeals reversed an order of the United States District Court for the Western District of Tennessee,

Western Division, which had granted a petition for a writ of habeas corpus unless the petitioner should be retried by the State of Tennessee within ninety days of its order signed the 21st day of September, 1978.

The Sixth Circuit also remanded the case with directions that the application for the writ of habeas corpus be dismissed.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee, June 30, 1977; certiorari denied by the Supreme Court of Tennessee, November 14, 1977, reported as Paul Eugene Vance vs. State of Tennessee, 557 S.W. 2d 750. Appearing in the appendix hereto (A-1-A-4).

The dissenting opinion in the Criminal Appeals Court is reported at 557 S.W. 2d 752. Appearing in the appendix hereto (A-5-A-9).

The opinion of the United States District Court for the Western District of Tennessee, Western Division appearing in the appendix hereto (A-10-A-15).

The opinion of the United States Court of Appeals for the Sixth Circuit appears in the appendix hereto (A-16-A-17).

JURISDICTION

1. The opinion of the United States Court of Appeals for the Sixth Circuit as entered June 21, 1979. (A-16).

2. Order of the United States Court of Appeals for the Sixth Circuit staying the mandate. (A-16).

3. The statutory provision believed to confer jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. Section 1254(1).

4. This petition comes late by virtue of the recent poverty of the petitioner, but with our sincere belief that herein are issues which should be decided by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Tennessee may deny to one religious organization a right or privilege granted to all other religious groups in the State of Tennessee.

2. Whether the State of Tennessee may deny a defendant his first amendment rights (religious freedom) under the United States Constitution upon the theory that such rights are lost if the jury finds that the defendant failed to carry the burden of proof.

3. Whether the defendant was denied the equal protection of the laws granted under the fourteenth amendment to the United States Constitution, when the defendant offered substantial proof of the religious activity of the church with which he was affiliated and as to the financial affairs of the church, and where the State of Tennessee offered no proof of any kind in rebuttal; yet, the State maintains that the jury in the absence of such proof may deprive the defendant of his rights derived under the first amendment.

4. Whether the defendant's rights under the first and fourteenth amendment to the United States Constitution were patently violated when the prosecution on cross-examination made fun of and ridiculed the defendant's church, his credentials and religious activity. In other words, when the State ridicules one's

religious beliefs does this alone and standing apart from all other factors constitute a violation of the defendant's first and fourteenth amendment rights.

5. Is the defendant denied his first and fourteenth amendment rights, when the trial judge summarily rules at the close of the State's case in chief and before the defendant testifies that he will instruct the jury that this is not exempt activity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part:

> "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof . . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Tennessee Code Annotated 39-2033 (8) provides:

> "This chapter (Chapter 20 on "Gaming") shall not apply to any bingo game, lottery, or similar game of chance conducted by charities, other religious or charitable groups, or any organization exempt from tax under paragraph (3) of subsection (c) §501 of the Internal Revenue Code of 1954, as tax under paragraph (5) of subsection (c) of section if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder,

> member or employee of such organization and if no part of the gross receipts derived from such activity is used for any other than benevolent, charitable or religious purposes or for the purpose of constructing, maintaining or renting a building to be occupied by such organization."

STATEMENT OF THE CASE

State's Case

The proof upon which the state obtained a conviction for gaming against the defendant is succinctly as follows: that several officers of the Memphis Police Department entered upon the church property and purchased several tabs which did not contain a winning combination; that they asked the defendant if he would have paid off had they been winning tickets and he responded he would have paid off (R-3, R-5); that the police produced pictures which clearly indicated the premises to be that of the church (R-19,24), and confiscated the machines which dispensed the tabs and bingo apparatus.

The trial court then took notice that the defendant had a right to assert a defense under T.C.A. 39-2033 (8), dealing with charitable and religious organizations; that the court, however, rules before the defendant has had an opportunity to present his case and at the close of the state's case in chief:

> "Its all down the drain. As a matter of fact, I am ruling as a matter of law and willing to instruct the jury these are gambling devices that are prohibited by law. I think you should know that now." (R-29,30)

Defendant's Case

The defendant offered the following proof as to the bona fides, function and charitable nature of the "Christian Church

of Faith" which operated the Southgate Chapel and Recreation Center:

1. The defendant testified that the tabs or tickets referred to as "rip-offs" were sold and utilized by other churches. (R-49,68, 75,77)

(a) That they used the same system as other churches (R-49).

(b) That the same tickets were sold by Catholic and Jewish Churches by having ladies sell them (R-68).

(c) That other churches were interested in the dispensing machines until the arrest (R-77).

(d) The dissenting opinion in the Criminal Court of Appeals acknowledges that:

"the type of gambling described in the record before us is no more, nor no less, than the activities carried on regularly by many other churches, labor unions, and fraternal and social clubs through the state. This limited legalization of gambling was authorized by the General Assembly and so long as an organization falling within the exempt status is the recipient of the proceeds, after deductible expenses from the otherwise unlawful activity, there is no violation involved." (R-140).

2. The defendant testified that the church operated as a religious organization.

(a) That it held services every Sunday (R-50,52)

(b) That it had a minister (R-50).

(c) That it held in addition to such services, group sessions (R-66,71) three to four times per week.

(d) That it held group meetings with young adults, runaways and drug addicts (R-52).

(e) Worked with people in trouble including other churches (R-52).

(f) That the church gave money to children for bus fare, bought clothes and furniture for people who had been burned out, donated to churches that were in foreclosure (specifically Eades, Tennessee) (R-53,54).

3. State objected to this testimony because it was irrelevant (R-53).

4. The defendant tendered and corroborated his testimony with witnesses:

(a) Alvin Warren testified: that they held church every Sunday, preaching by Reverend Andrew Patten, that the church has helped others; that it helped him by giving him $531.00 to apply to past due house notes; that he (it) helped a woman whose husband was sick and a boy who said he was hungry by buying three bags of groceries (R-79,80); that he did not have to pay back the money (R-84).

5. That the money borrowed was from the church and not the defendant (R-83).

6. Church services have 10 to 12 at services when the witness attended (R-84).

7. The state did not offer a single witness, document or matter of evidence in rebuttal to the defendant's corroborated testimony as to its religious and charitable functions and deeds (this is supported by its absence from the record and found as a fact in the dissenting opinion in the Court of Appeals (R-140).

While the state did not produce any evidence in rebuttal, it did on cross-examination ridicule the religion of the defendant in the presence of the jury in the following manner:

(a) Refers to the defendant's church as "Free Spirit Religion" (R-61).

(b) Says church flexible to meet whatever needs you might have (R-61).

(c) Says after three weeks of foreign intensive training all of sudden you are an ordained minister (R-63).

(d) Says to defendant "Do you pray over the machines?" Defendant objects and court simply says "that's fictitious" and makes no admonishment (R-65).

(e) When defendant testified that a church may go bankrupt, State says "It sure can if sales are down" (R-65).

(f) State asks arresting officer why tabs are called a "rip-off", the officer answered because they have a little zipper front that you rip off on the front. State asked some questions and illicited hearsay testimony that "people that play them say that they are ripped off when—in other words it is a rip-off because you very seldom ever win." (R-9).

(g) State says with reference to the machines and without allowing the witness to answer by finishing the defendant's answer: "You thought you'd make a fortune off of them" (R-76).

(h) State asked: "I see. Maybe they come in and borrow $20.00 and more to catch buses to work and back, but you don't know" (R-87).

(i) State asked witness: if he had seen anyone borrow money to hit the big jackpot (R-86).

With respect to whether or not the defendant or the church made money improperly, the defendant testified that the church did not make enough money to pay the mortgage and lost a considerable amount of money (R-49-70), and that such money as was made went to the church (R-75).

The jury fined and sentenced the defendant almost the maximum on each count of the indictment (R-107-113, 123-129).

CONSTITUTIONAL ISSUE

The report of the United States Magistrate discusses the history of this matter in the state court system and is appended hereto (A-18), the constitutional issues are further discussed in the minority opinion (A-5-A-9).

REASONS THE WRIT SHOULD BE GRANTED

With regard to the exercise of religious freedom and the right of the government to interfere, there appears to be two courses of action decided by this Court. In the first, where certain rights are granted to the whole, this Court has uniformly held that one may not be deprived of such rights and privileges. Derivative of this line is also those cases where because of its bizarre practices some right, privilege or practice is sought by the government to be limited which this Court has held to be an improper intrusion. Cases in support of this basic approach by the court are *U.S. v. Ballard*, 322 U.S. 78, *Fowler v. Rhode Island*, 345 U.S. 67, *Niemotko v. Maryland*, 340 U.S. 268. Similar cases regarding restricting use of public property which constitute a violation of freedom of speech, press and religion are *Kung v. New York*, 340 U.S. 290, *Saia v. New York*, 334 U.S. 558, *Hogue v. CIO*, 307 U.S. 496, *Lovell v. Griffin*, 303 U.S. 444.

The second line of cases might be typified by *U.S. Kuch*, 288 F.Supp. 439. Generally, when a group seeks to carve out a unique privilege or right unto itself, not shared in by others and especially when such right is in opposition to some strong governmental interest, then some limitations have been imposed.

It is our position that our case falls clearly within the first line and therefore the Sixth Circuit decision is in opposition to prior decisions of this Court.

1. The Decision of the Sixth Circuit Court of Appeals and the Criminal Court of Appeals Conflicts With Decisions of This Court

It is attempted to be shown in the statement of the case that the defendant was compelled to introduce proof that the church was religious and was properly operated within the dictates of T.C.A. 39-2033 (8). The defendant testified that the church had what would be regarded by most as rather orthodox beliefs and practices. He testified that such money as was derived from church activity did not go to him but rather to the church (R-75). The defendant testified that such money as the church had was used for religious and charitable purposes and, in fact, that the church lost money.

It seems incredible that the Court of Appeals could find that the defendant introduced no proof to negative the exception under the Tennessee statute and had therefore failed to carry the burden of proof.

The question then is whether the burden of proof may be used as a manner of determining whether or not one is religious within the said exemption.

In the case of *U.S. v. Ballard*, 322 U.S. 78, this court firmly established that one may not be put to prove his religion, religious beliefs, or, indeed, the verity of those beliefs. The court

also held that it was not the business of courts to say what is religious for one is not for another and that those issues may not be submitted to a jury and goes on to say:

> "If one could be sent to jail because a jury, in a hostile environment, found those teachings false, little indeed would be left of religious freedom."

Also, along this line is *Fowler v. Rhode Island*, 345 U.S. 67. Here the court said:

> "The right to equal protection of the laws in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has firmer foundations than the whims or personal opinions of a local governing body."

In our case before this court, it must be remembered that the state did not offer a single witness to rebut any of the proof, that all money went to the church, that such money as the church had went to religious and charitable purposes and that the church lost money. How then could a conviction be had, except as a result of the derogatory remarks made by the prosecutor. The prosecutor referred to the defendant's church as "Free Spirit Religion" (R-61), that it was flexible to meet needs (R-62), cast aspersions on the ordination of defendant (R-63) and so on.

Thus, each and every remark made by the prosecutor flies directly into the face of first amendment rights and the equal protection of the laws under the fourteenth amendment. This is so because each assault constitutes putting one's religious beliefs on trial before the jury which is not allowed under *Ballard* and other cases.

2. The Burden of Proof

The majority opinion in the Tennessee Court of Appeals takes the position that an exception not in the enacting clause must be negatived by the defendant and especially so when the facts are peculiarly within his knowledge. Both have therefore acknowledged as a basis therefor *Wharton's Criminal Evidence,* 13th edition, Vol. 1, Sec. 20. However, as shown in the minority opinion in the Court of Appeals, the majority rule is that when evidence appears which tends to bring the defendant within an exception not located in the enacting clause, the burden of proof is shifted back to the prosecution, on the whole case, to overcome that evidence beyond a reasonable doubt. This, although in the same section, was overlooked by both appellate courts.

This defendant herewith adopts the minority opinion with regard to the Tennessee cases on the shifting of the burden of proof and submits that we have in this case a conviction without one witness testifying that the defendant did anything wrong or in violation of the gaming laws by specially benefiting himself or others.

Thus, since there was only evidence in the case that all of the church's activities were proper, the only basis upon which a jury could convict was that the church was in fact a sham. In so doing, they unproperly tested his religion and denied the defendant his first amendment rights.

3. Rights Granted One or All Religious Groups May Not Be Denied to Another Religious Group

When the General Assembly of the State of Tennessee saw fit to pass T.C.A. 39-2033(8), it granted to all religious groups an exemptive status. By denying that status to one such group, and introducing no proof of culpability, the state has violated such groups' first amendment rights by preferring one religious

group over another or effectively restraining one groups' free exercise of first amendment rights. This Honorable Court has on numerous occasions held that a right granted to one religious group may not be denied to another, *Fowler v. Rhode Island,* 345 U.S. 67, *Niemotko v. Maryland,* 340 U.S. 268.

We also urge that by passing the said statute the General Assembly waived its governmental interest as to those groups exempted.

4. Trial Court's Charge

Under T.C.A. 39-2033(8), any devices the defendant had for bingo, lotteries or similar games of chance were exempt as to religious organizations. When the trial court found that these were prohibited devices, it summarily denied the defendant's church its religious status. This ruling the trial court made before the defendant had put on any proof (R-29,30). Furthermore, the trial court sustained an objection which cut off inquiry tending to show that other churches were operating and using similar practices (R-18). We contend that these actions by the trial court effectively denied the defendant his religious exemption before he had an opportunity to show the exemption and therefore is in violation of *U.S. v. Ballard* because it preemptively denied him his first and fourteenth amendment rights.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgments and opinions of the United States Court of Appeals Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

PAUL EUGENE VANCE, Appellant,

v.

STATE OF TENNESSEE, Appellee.

Court of Criminal Appeals of Tennessee

June 30, 1977

Certiorari Denied by Supreme Court

Nov. 14, 1977

Defendant was convicted before the Criminal Court, Shelby County, William H. Williams, J., of professional gambling, maintaining a gambling premises, and encouraging, promoting, or exhibiting a gambling table or device, and he appealed. The Court of Criminal Appeals, Russell, J., held that evidence was insufficient to establish that gambling house operated by defendant was exempt from laws prohibiting gambling activities because it was church operated.

Affirmed.

Galbreath, J., dissented and filed opinion.

1. **Gaming** Key 98(1)

Evidence in prosecution for professional gambling, maintaining a gambling premises, and encouraging, promoting, or exhibiting a gambling table or device was insufficient to establish that gambling house operated by defendant was exempt from laws prohibiting gambling activities because it was church operated. T.C.A. §§ 39-2002, 39-2032, 39-2033(8), 39-2036(4).

2. **Criminal Law** Key 329

Where certain categories of activities similar to acts which constitute crime are exempted from criminal liability in inde-

pendent section of act defining particular crime, it is up to defendant to bring himself within exemption.

Ham Patterson, Memphis, for Appellant.

Brooks McLemore, Jr., Atty. Gen., Jack E. Seaman, Asst. Atty. Gen., Nashville, Joseph B. Dailey, Asst. Dist. Atty. Gen., Memphis, for appellee.

RUSSELL, Judge.

OPINION

This is an appeal by Paul Eugene Vance from his convictions for professional gambling in violation of T.C.A. § 39-2032; maintaining a gambling premise in violation of T.C.A. § 39-2036(4); and encouraging, promoting, or exhibiting a gambling table or device in violation of T.C.A. § 39-2002. Jail sentences for the latter convictions were ordered served concurrently with the two to three years in the penitentiary fixed for professional gambling; and $1,000 fines were levied in each case.

Vance was unquestionably and admittedly operating a storefront gambling premise in Memphis. His effort at a defense was based upon his contention that the operation was church operated. The brief and argument presented in his behalf upon this appeal consists of only two sentences (aside from the statement of the assignments of error and the statement of the case), wherein it is said that the general gaming statutes of Tennessee do not apply to religious groups operating bingo games, lotteries or similar games of chance, and that the device for which the defendant was indicted was a lottery. (The three assignments of error contend that the evidence preponderated against the verdict, that the game of chance conducted by Vance was legal because pursued by a religious organization, and that the sales tax exemption certificate of the Christian Church of Faith should have been admitted into evidence.)

[1] This case boils down to the fact that Vance claims an affirmative defense to operating a gambling house; that is, that it was church operated. It is unnecessary for us to examine the evidence on this point with strictness, because Vance has utterly failed to present any evidence that would qualify his operation for exemption as that of a religious or charitable group under that provision of the law, T.C.A. § 39-2033(8), which grants such institutions exemption only "if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member or employee of such organization and if no part of the gross receipts derived from such activity is used for any other than benevolent, charitable or religious purposes or for the purpose of constructing, maintaining of renting a building to be occupied by such organization". As the State points out in its brief, there is no such showing in this case. While Vance presented evidence that his was a church operation, engaging also in some charity, no evidence was presented tending to show that no person benefitted individually or that all of the gross receipts were used for benevolent, charitable or religious purposes.

[2] The law in Tennessee is that where certain categories of activities similar to the acts which constitute a crime are exempted from criminal liability by an independent section of the act defining the particular crime, it is up to the defendant to bring himself within the exemption. *Villines v. State*, 96 Tenn. 141, 33 S.W. 922 (1896). This is in accord with other jurisdictions. This language appears in *Wharton's Criminal Evidence*, 13th Edition, Vol. 1, § 20:

> As a general rule, the defendant must prove that he is within the operation of an exception to a penal statute in order to take advantage of it.
>
> * * * * * * *
>
> An exception which is not located in the enacting clause of a statute is treated as a matter of defense in the ordinary

case; but an exception found in the enacting clause is regarded as a matter of defense only when the evidence concerning it is peculiarly within the knowledge or at the disposal of the defendant, or, according to a few authorities, only when the statute is interpreted as making the exceptive circumstances an excuse or justification for the defendant's conduct in such a way as to regard it only as defensive matter. Thus, a number of courts have held that the prosecutor's case is supported in the first instance by eviof the facts properly stated in the charge, i.e., those facts necessary to bring the defendant under the general prohibition of the enacting clause. The prosecutor need not negative, by proof in advance, exceptions not found in that clause.

* * * * * * *

When the enacting clause contains a general prohibition intended by the legislature as describing prima facie the conduct proscribed, and hence the phrase referring to other provisions of the statute is disregarded in the prosecution's charge, the burden is on the defendant to offer evidence of the exceptive facts. When an exceptive provision referred to in the initial language of the enacting clause is taken to be incorporated with that language as essential to com'ete the general prohibition of the statute, the burden is upon the prosecution to negative that provision, prima facie, as part of its main case. There is no such burden imposed on the prosecution, however, when the facts hypothesized in the exceptive provision are peculiarly within the knowledge of the defendant, or the evidence concerning them is within his private control.

There being no evidence that Vance qualified for exemption from the provisions of these statutes, which he clearly violated, we affirm the convictions.

DAUGHTREY, J., concurs.

APPENDIX B

GALBREATH, Judge, dissenting.

The Christian Church of Faith, a duly chartered religious corporation in Tennessee, ostensibly had operated for its benefit by the appellant, who testified he was ordained as a minister by the Church of Gospel Ministry and the Calvary Grace Christian Church (now operating as the All Faith Temple in Chattanooga, Tennessee), a bingo and lottery parlor until raided by the Memphis Vice Squad on the 26th of December, 1975. The majority affirms his conviction for violating T.C.A. § 39-2032, proscribing professional gambling, and related activities. I dissent.

I fear that the majority wanders into the forbidden thicket of the First Amendment in such a manner that, if a valid intrusion, will raise once again the centuries old inquiry into the propriety of government defining what constitutes an organized religion.

I cannot concur in the majority's view that the burden of proving a negative, i.e., "[that] no part of the gross receipts" from the church sponsored gaming inured to his benefit, is on the defendant. But even if he did have to in effect prove his innocence, I believe the record demonstrates that charitable works were carried out by the church and the defendant testified on cross-examination when asked what happened to money derived from gambling activity, "It went into the general fund of the church." When pressed further and upon being asked into whose pockets the money went, the defendant rather picturesquely replied, "It went into the church's pocket."

The majority's opinion finds that the appellant failed to bring himself into the exception found in T.C.A. § 39-2033(8) and

quotes at length from *Wharton's Criminal Evidence*, 13th Edition, Vol. 1, § 20. However, the majority fails to quote all of that section especially where it is pointed out that:

> "By weight of authority, when evidence appears which tends to bring the defendant within an exception not located in the enacting clause, the burden of proof is on the prosecution, on the whole case, to overcome that evidence beyond a reasonable doubt. Opposing decisions would place the burden of proof on the defendant to establish the exceptive facts by a preponderance of the evidence. Some of the decisions which might otherwise be cited to support the view that the technical burden of proof is on the defendant should be distinguished because of the wording of the particular exception. When words occur in a defensive exception, such as 'if it shall appear,' or 'if it shall be made to appear,' or 'if it shall be proved,' the frequent inference is that the legislature intended to place the burden upon the party whose place it was to go forward under the exception to establish the facts under it.
>
> * * * * * * *
>
> "As a general proposition, where an exception merely refers to, or carves out, other grades or phases of the same offense, it need not be negatived, whether the reference is made by adverting to other provisions generally, or by an exception of the facts characterizing the other type of the crime."

This situation on the burden of proof for a statutory defense is similar to the situation when insanity is raised as a defense. There is a presumption of sanity which results in placing the burden of showing insanity at the time of the commission of the crime upon the defendant in the first instance. However, if the evidence raises a reasonable doubt as to the defendant's sanity, such evidence relieves the defendant of further proof upon

the issue and shifts the burden to the prosecution. *Collins v. State*, Tenn.Cr.App., 506 S.W.2d 179 (1973).

The law in Tennessee is not clear as to which party has the burden of proving a statutory defense, when that burden is discharged, and when the State must rebut a showing that a defendant comes within a statutory exception. The case cited by the majority is inapposite.

For example, in *Griffin v. State*, 109 Tenn. 17, 70 S.W. 61, 65 (1902), it is pointed out that on a prosecution for taking any female from her father, etc., without his consent, for the purpose of prostitution or concubinage, an accused may discharge the burden on him of showing the unchastity of the female by introducing enough testimony to raise a reasonable doubt as to her chastity. Although not altogether clear from that opinion, it seems some proof as to the chastity of the female in question was introduced in *Griffin* so as to provide a basis for the jury to find beyond a reasonable doubt that that woman was chaste.

Other Tennessee cases refer to the rule that where the negation of a fact is peculiarly within the knowledge of the defendant, the burden is on him to establish that fact. See *Knowling v. State*, 176 Tenn. 56, 138 S.W.2d 416 (1940), *Terrell v. State*, 210 Tenn. 632, 361 S.W.2d 489 (1962). However, it appears that in both *Knowling* and *Terrell* (which is based on *Knowling*) *supra*, the defendants failed to present *any* evidence to cause their initial burden to shift. Consequently, while those cases appear rightly decided, they cannot be relied upon as establishing a rule applicable to where, as in the instant case, the defendant presents enough proof to shift the burden to the State and consequently requires it to prove the point in issue beyond a reasonable doubt. Here the State has failed to show that any "part of the gross receipts" from the gaming were devoted to noncharitable purposes.

Substantial proof was adduced that religious services and charitable works had been conducted by and on behalf of the church, although from the record it is plain that the theory of the State was that the church was of questionable substance and existed only so that gambling could be carried on in its name.

Proof was presented that the church sponsored a recreation center; conducted group meetings with young adults, runaways and drug addicts; that money was given to assist victims of burned homes; that food was provided for the poor; and in one instance, as much as three hundred dollars was donated to one needy person.

Testimony of more orthodox church activities such as services on Sunday and preaching was adduced and none of the proof, to the effect that the church was in fact a church and that its charitable activities were genuine, was, to my view, negated.

The gambling laws of this State permit games of chance to be conducted under certain restrictions specified in T.C.A. § 39-2033(8), exempting churches, among other eleemosynary institutions, from the criminal sanctions on other forms of gaming.

The type of gambling described in the record before us is no more, nor no less, than the activities carried on regularly by many other churches, labor unions, and fraternal and social clubs throughout the State. This limited legalization of gambling was authorized by the General Assembly and so long as an organization falling within the exempt status is the recipient of the proceeds, after deductible expenses from the otherwise unlawful activity, there is no violation involved.

Not involved here is the issue of what sanctions would result if one conducting bingo or other permissible types of gaming

for a church or other charitable organization pockets the proceeds so as to defraud the intended recipient of any profits. No such felony as embezzlement or obtaining money under false pretenses has been charged. The State introduced no proof that the appellant pocketed the proceeds from the gambling operation.

What does or does not constitute a church has addressed itself to the conscience of individuals and governments for centuries. The Christian Church of Faith has evidentially convinced both the State of Tennessee and the United States Internal Revenue Service that it is, indeed, a church.[1] We do not believe this Court, nor a jury in Shelby County, has the authority to withhold from any organization duly incorporated and recognized by secular authority, as a religious organization, the recognition claimed by the church said to be served by the Reverend Vance. If he is hiding behind a false and hypocritical religious facade, he is among many others who do so for various and plentiful reasons. A Higher Authority than ours will have to judge his sincerity.

The State having completely failed to rebut the prima facie showing by the appellant that he came within the applicable exception, I would reverse the conviction.

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[1] It is not clear that documents admitted for identification purposes only purporting to establish tax exempt status were in effect at the time of appellant's arrest.

APPENDIX C

In the United States District Court for the
Western District of Tennessee
Western Division

Paul E. Vance,
Petitioner,
v.
Eugene Barksdale, et al.,
Respondents.
No. 78-2037

ORDER

(Filed September 21, 1978)

The petition for habeas corpus relief was filed to challenge the petitioner's state conviction under TCA §§ 39-2002, -2034, and -2034(4) which prohibit certain gaming and gambling activities. Upon the Report of the United States Magistrate that all adequate state remedies had been exhausted, the respondents were ordered to respond.

The petitioner, now incarcerated, was arrested in Memphis, Shelby County, Tennessee, at the "Southgate Chapel and Recreational Center sponsored by the Christian Church of Faith" as an active associate or agent of that entity. The Center's apparent "recreational activities" consisted of bingo games, devices known as "punchboards", and doctored postage stamp machines which distributed numbered cards known as "rip-offs." Throughout all the proceedings, petitioner has maintained that the church functioned as a bona fide religious or eleemosynary

institution entitled to an exemption from the gambling statutes of the State of Tennessee under which he was charged.[1]

The trial court quoted to the jury the relevant statutes, including the exemption provision in footnote 1, but ruled as a matter of law that the gambling activities were not exempt as games of chance similar to bingo or a lottery allowed to be conducted by charitable groups. The court also generally instructed the jury regarding the government's burden of proof. The "church" had obtained from the State of Tennessee a certificate as the "Christian Church of Faith" under the Tennessee General Corporation Act in 1973 before the offense occurred.

In his brief, the petitioner argues, first, that the trial court (or, by implication, the jury) unconstitutionally took it upon itself to determine the bona fide and religious nature of his organization. This specific issue was apparently never addressed by petitioner to the state court. The trial judge simply instructed the jury that the exemption did not apply without considering and ruling upon the religious status of the "Christian Church of Faith," and without indicating which prong of the two-fold test—religious organization or the gross receipts proviso—was not met by the defendant Vance. First Amendment question posited by the petitioner is that it is unconstitutional for a trier of fact to determine the "bona fides" of a claimed religious organization. Selective service—conscientious objector cases such as *United States v. Seeger*, 380 U.S. 163 (1964) have indicated that courts should not strictly subject religious beliefs to some orthodox or preconceived standard, because "one might be religious without belonging to an organized

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[1] TCA § 39-2033(8) reads in pertinent part: "This chapter shall not apply to any bingo game, lottery, or similar game of chance conducted by charities, [or] other religious or charitable groups . . . if no part of the gross receipts derived from such activity is used for any other than benevolent, charitable or religious purposes or for the purpose of constructing, maintaining or renting a building to be occupied by such organization."

church . . ." 380 U.S. 172. *See* also *Welsh v. United States*, 398 U.S. 333 (1970). "The term 'religion' is not defined in the Constitution. Indeed, a succinct and comprehensive definition of that concept would appear to be a judicial impossibility." *Remmers v. Brewer*, 361 F.Supp. 537, 540 (1973). The latter case held only a minimal showing to be necessary to entitle a group claiming to be a church to be entitled to recognition as such in a prison setting and "within the ambit of the First Amendment." 361 F.Supp. 542. Truth or verity of purported religious doctrines or belief, even if bizarre or preposterous, are not questions to be submitted to a jury even in a mail fraud trial involving claims of supernatural healing powers. *United States v. Ballard*, 322 U.S. 78 (1944). "The first amendment does not select any one group or type of religion for preferred treatment." 322 U.S. 87.

Even though this Court may agree with the Tennessee Court of Appeals (Judge Russell) that "Vance was unquestionably and admittedly operating a store-front gambling premise in Memphis," he contended it was "church operated." The state in such event may perhaps require a minimal showing that an organization is indeed a "charitable or religious group" [as that exempted type of organization as defined in TCA § 39-2033 (8)], but it cannot properly put purported religious beliefs to a test of orthodoxy or good faith in order to be established as exempt.

The state appellate court in affirming the conviction, however, rested its finding on petitioner's failure to establish that "no part of gross receipts" from gaming activities "is used for other than benevolent, charitable or religious purposes or for the purpose of constructing, maintaining or renting a building to be occupied by such organization."

The Tennessee Court of Criminal Appeals noted that, although the record contained testimony regarding the organization's alleged charitable projects and weekly services, "no evidence was presented tending to show that no person benefitted individually or that all of the gross receipts [from the operations] were used for benevolent, charitable or religious purposes."

> "The law in Tennessee is that where certain categories of activities . . . are exempted from criminal liability by an independent section of the act defining the particular crime, it is up to the defendant to bring himself within the exemption. *Villines v. State*, 96 Tenn. 141, 33 S.W. 922 (1896)."

The petitioner contends that the burden was instead upon the State to prove that a portion of gross receipts was used for non-charitable purposes. Alternatively, he argues that he successfully proved that neither he nor anyone else unlawfully benefitted from the proceeds.

To support his position, the petitioner cites the general principle that the prosecution bears the burden of proving an exemption which is incorporated in the enacting clause of a criminal statute while the defendant must establish an exception in a subsequent clause. Petitioner then directs the Court's attention to an explanatory case and annotation found at 153 A.L.R. 1213 *et seq.* (1944). The authorities there cited fail to support his position, however, since the exemption here involved is found not in the enacting clause, but rather in an exception. TCA § 39-2033(8) is an exception which is incorporated into TCA § 39-2031 through 2037, the "gaming laws" of the State of Tennessee. The exception by its terms is conditioned upon the use of gross receipts for charitable or religious purposes. A statutory offense is fully charged without reference thereto; the religious organization exemption is wholly a matter of defense. *See McHenry v. State*, 168 Tenn. 667, 80 S.W.2d 655 (1935); *State v. Brewer*, 163 Tenn. 215, 42 S.W. 2d 344 (1931). Moreover,

". . . where a negation is peculiarly within the knowledge of the defendant, the burden is upon him to establish that fact." *Terrell v. State*, 210 Tenn. 632, 361 S.W.2d 489 (1962). *Citing, Knowling v. State*, 176 Tenn. 36, 138 S.W. 2d 416 (1940).

Clearly this information was under the Petitioner's control in this case.

Thus, it was incumbent upon the Petitioner to present adequate and persuasive proof that no part of the gross receipts, from the operations were used for other than religious or charitable purposes.

Judge Galbreath, dissenting in this case, No. 41 (Tenn. Ct. Crim. App. 6/30/77), acknowledged that *Terrell v. State, supra*, and *Knowling v. State, supra*, placed the burden of coming forward and rebutting the application of the law upon the defense when negation depends upon facts peculiarly within the defendant's knowledge. He believed, however, as the petitioner now contends, that the defense presented evidence adequate "to shift the burden to the state to prove the point in issue beyond a reasonable doubt." *Vance v. State, supra*, p. 4 (Galbreath, J., dissenting).

The following testimony relating to the use of gross receipts was adduced upon cross-examination of the defendant:

"Q. . . . And where did this money go?

A. It went into the general fund for the church.

Q. Into whose pockets?

A. It went into the church's pockets."

Bill of Exceptions, p. 75. Notwithstanding the fact that this testimony reflects that the "church's" coffers were enriched by the money deposited into the rip-off machines, it does not

indicate that part of gross receipts were or were not funnelled to others for other than benevolent purposes or for the purposes of maintaining or renting the chapel/recreation center. Defendant in a state criminal trial may be required to establish an exemption or an affirmative defense provided the prosecution has first proved every essential element of the crime charged beyond a reasonable doubt. *Patterson v. State of New York*, — U.S. —, 45 U.S.L.W. 4708 (1977).

This Court recognizes that the State's evidence clearly showed an open gambling operation was in progress at the purported "church." The exemption in the statute presents difficulties, however, about determining what are "benevolent, religious or charitable purposes" for which gross receipts are to be utilized. After reviewing the record, this Court is not satisfied that the issues of exemption and entitlement to an exemption were properly put to the jury so as to enable the defendant to have a determination by the jury as to whether or not Vance could claim an affirmative defense in accordance with the statute even though he was engaged in what otherwise would have been illegal gambling.

Accordingly, the petition for habeas corpus will be granted unless the State tries the defendant again taking into account these considerations within ninety (90) days (unless extended by Order of this Court). Petitioner will be entitled to reasonable bond during the interim between this Order and trial equivalet to that set prior to his first trial on these charges in the Criminal Courts of Shelby County, Tennessee.

This 21st day of September, 1978.

/s/ HARRY W. WELLFORD, Judge
United States District Court

APPENDIX D

No. 78-1566

United States Court of Appeals
For the Sixth Circuit

Paul E. Vance, Petitioner-Appellee,

v.

Eugene Barksdale, Sheriff, Respondent-Appellant.

ORDER

(Filed June 21, 1979)

Before: WEICK and LIVELY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

The respondent appeals from a judgment of the district court granting a writ or habeas corpus to the petitioner pursuant to 28 U.S.C. § 2254. The respondent contends on appeal that the district court misconstrued the issues which were involved in the state prosecution at which the petitioner was convicted and that no constitutional rights of the petitioners were violated. The petitioner was convicted in the state court proceedings of violating the Tennessee gambling laws and successfully contended in the district court that the state trial court failed to submit to the jury the issue of whether petitioner was entitled to claim an exemption from the Tennessee gambling laws which is accorded to churches and other charitable organizations.

Upon consideration of the briefs and oral arguments of counsel and the record on appeal, the court concludes that the

petitioner made no showing that he was deprived of constitutional rights in the state court proceedings. The Court of Criminal Appeals of Tennessee properly found that the petitioner, as defendant in the state prosecution, offered no evidence which would require the submission to the jury of the issue of his entitlement to claim the exemption granted to religious organizations and other charities. *Vance v. State of Tennessee*, 557 S.W.2d 750 (1976).

The judgment of the district court is reversed and the case is remanded with directions to dismiss the application for a writ of habeas corpus.

ENTERED BY ORDER OF THE COURT

/s/ JOHN A. (Illegible)
Clerk

APPENDIX E

In the United States District Court for the
Western District of Tennessee
Western Division

Paul E. Vance,
Petitioner,
vs.
Eugene Barksdale, et al,,
Respondents.
No. 78-2037

REPORT

From the petition in this cause and the opinion of the Tennessee Court of Criminal Appeals, it appears that the petitioner was convicted in the Criminal Court of Shelby County for professional gambling, maintaining a premises for gambling, and exhibiting a gaming device. His defense was that his gambling operation was excepted from the Tennessee prohibitions against gaming under T.C.A. 39-2033(8) which grants certain exemptions to religious and other eleemosynary institutions. His defense was rejected.

The majority opinion of the Tennessee Court of Criminal Appeals held that the defendant failed to present evidence bringing him within the exemption statute by failing to present evidence "tending to show that no person benefitted individually or that all of the gross receipts were used for benevolent, charitable or religious purposes." The dissenting opinion by Judge Galbreath addressed the potential First Amendment problem raised by the rejection of the petitioner's defense in the trial court. Judge Galbreath would have reversed.

Here the petitioner asserts that his rights under the religious freedom clause of the First Amendment to the Constitution of the United States has been violated and that he has not been accorded equal protection of the laws as required by the Fourteenth Amendment. It is not possible to determine the extent to which these precise issues were presnted to the state court, but I believe the petitioner has adequately exhausted his state remedies in any event.

> *It is now clear that the exhaustion of state remedies provision refers only to those remedies in existence at the time the petitioner makes his contention.* [Sokal, *Federal Habeas Corpus*, 2d Ed., §22.2, p. 165.]

Tennessee Code Annotated 40-3812, part of the post-conviction procedure provisions of the Tennessee Code provides the following:

> *When ground for relief is "previously determined" or "waived."—A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.*
>
> *A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.* [Acts 1967, ch. 310, §11; 1971, ch. 96, §4.]

Even if the precise constitutional points made here were not presented to the state court the defendant did present the overall claim that the rejection of his defense under 39-2033(8) was error. The dissent in the Tennessee Court of Criminal Appeals indicates that the rejection of his defense was challenged on constitutional grounds. In any event, he certainly could have

presented his constitutional claims in the context of his state case and, if he did not do so, would have waived them under T.C.A. 40-3812. It does not appear, therefore, that there is any state remedy presently available to the petitioner. I would recommend that the court enter a show cause order requiring the defendants to respond to the petition.

SUBMITTED this the 26th day of January, 1978.

AARON BROWN, JR.
United States Magistrate